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No. 81-617

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID D'ANGELO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he was deprived of the effective assistance of counsel.

1. After a jury trial in United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to possess and distribute heroin, in violation of 21 U.S.C. 846, and on two counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 10 years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. 1-10).

a. The indictment in this case charged petitioner, together with eight co-defendants, with participating in a heroin distribution conspiracy.[1] Petitioner's co-defendants pleaded guilty following hearings on various pretrial motions. On the day before petitioner's trial was scheduled to commence, and after a jury had been selected and sworn, petitioner informed the district court that he wished to obtain new counsel because he and his attorney, Joseph Stone, disagreed on certain matters. Despite the fact that the trial date had been set weeks earlier, the court agreed to permit petitioner to seek new counsel (Tr. 510).

The next morning, petitioner appeared with Mr. Stone and another attorney, who said that he would enter the case only if the court would declare a mistrial and grant a two to three week continuance, explaining that he would not go to trial without participating in the selection of the jury and that the continuance was necessary to prepare an unidentified "affirmative defense" (Tr. 505-506). Petitioner told the court that he and Stone had disagreed on several matters of trial strategy.[2] Noting that the jury had already been selected and sworn, and that during the three months that Stone had been petitioner's counsel of record he had represented petitioner's interests diligently and would continue to do so, the court denied the application for substitution of counsel and a continuance (Tr. 523).

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[1]Co-defendant Anthony Todisco was charged with organizing a continuing criminal enterprise, in violation of 21 U.S.C. 848. The remaining counts of the indictment charged individual defendants with possession of heroin.

[2]According to petitioner, Stone initially had agreed with counsel for the other defendants to waive a jury, contrary to petitioner's wishes (Tr. 519). The district court pointed out to petitioner that he in fact elected not to waive a jury (Tr. 520). Petitioner also claimed that he and Stone differed about whether to enter into certain stipulations with the government and whether to call certain witnesses in petitioner's defense (Tr. 519-520).

b. The government's evidence at trial showed that co-defendant Todisco headed a large-scale heroin distribution organization that supplied almost pure heroin to drug dealers in the New York City area. Between May and September 1980, an undercover agent made six purchases of increasingly larger quantities of heroin. The first five purchases were of one ounce on May 14, 1980, and one-eighth of a kilo each on May 27, June 26, August 1 and 14, 1980. The sixth purchase, on September 3, 1980, involved half a kilogram of heroin at a purchase price of $137,500. This purchase was the first installment of a three kilogram transaction negotiated for a total price of $825,000. After the half-kilo purchase was completed, the defendants were arrested. Subsequent searches led to the seizure of the remaining two and one-half kilos of heroin.

Petitioner was connected to the conspiracy by pen register evidence that showed that co-defendant Todisco made four calls to petitioner's residence on the day before the June 26 sale and five calls to petitioner's residence on the day of the August 1 sale (Tr. 676-679, 748-750). After the last of the calls on August 1, petitioner met briefly with Todisco and co-defendant Anthony Vallone at an ice cream store parking lot. Todisco returned to his home and called co-defendant Hector Torres; shortly thereafter the undercover agent received a call from co-defendant Luis Acosta setting a time for the heroin purchase. Fifteen minutes later, Vallone met again with petitioner in the ice cream store parking lot. Petitioner parked his car next to Vallone's vehicle and quickly reached his hand into Vallone's car. Immediately after petitioner withdrew his hand from Vallone's vehicle, both cars departed (Tr. 774-780, 785-787). Shortly thereafter, Vallone drove co-defendant Torres to

co-defendant Acosta's office, where Torres delivered the heroin to the undercover agent (Tr. 769-772).[3]

Two days prior to the August 14 sale, Todisco called petitioner and arranged to meet petitioner "where we usually go" (C.A. App. 71-72).[4] Soon afterward, petitioner, carrying a blue vinyl package, met Todisco at the ice cream store parking lot, got into Todisco's car, and left a few minutes later carrying a larger black vinyl package (Tr. 940-943). When petitioner was arrested, he initially gave a false name and denied knowing Todisco, even though a telephone list that he had in his possession contained Todisco's nickname and telephone number (Tr. 1231; see Tr. 674).

c. In his opening statement, defense attorney Stone emphasized to the jury that he represented only petitioner, not the other defendants who were charged in the indictment. He pointed out that petitioner was not arrested in possession of either narcotics or weapons and lacked the financial resources that a narcotics dealer would be expected to possess. He suggested that the government's evidence against petitioner would consist of innuendos concerning which the jurors would be asked to use their imaginations rather than their common sense, and he urged the jurors to distinguish between that evidence and the other evidence that would be produced to show that the other defendants had engaged in a heroin distribution scheme (Tr. 549-555).

In cross-examining the government agents who testified, Stone brought out that petitioner was not seen with anything in his hand when he met Vallone at the ice cream store

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[3]Torres explained to the agent that the transaction had been delayed because some people from Baltimore had purchased all of the heroin that his source had on hand and his source had to obtain the one-eighth kilo from one of his partners (Tr. 769-770).

[4]By this time, a court-authorized wiretap had been placed on Todisco's telephone.

parking lot (Tr. 693, 713, 801) and was not seen to give anything to or receive anything from Vallone or Todisco (Tr. 697). In response to Stone's questioning, one agent stated that his testimony that heroin was passed at that meeting was an opinion based upon his imagination, experience and expertise (Tr. 698, 701). Counsel then showed that despite his expertise the agent made numerous errors of recollection in recounting petitioner's activities (Tr. 720-722). In addition, attorney Stone brought out that petitioner was never mentioned in overheard telephone calls between Todisco and Vallone (Tr. 1064), that a pen register on petitioner's telephone showed no calls to other members of the conspiracy (Tr. 1246-1247), and that the pen register revealing calls from Todisco to petitioner did not show whether the calls were in fact completed or, if they were, that it was Todisco and petitioner rather than members of their families who participated in the conversations (Tr. 753-754, 759-761). Counsel showed that, in contradistinction to the other defendants, no search was made or attempted of petitioner's apartment (Tr. 1245-1246).

Finally, Stone established that in order for the government to charge and convict Todisco for operating a continuing criminal enterprise, the government had to prove that five other persons participated in the enterprise. Counsel developed the theory that petitioner was charged because the agents may have thought that Torres and Acosta, as customers of Todisco, were not includable among the five participants in the enterprise (Tr. 1120-1122, 1132-1133, 1200).[5]

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[5]Against Stone's advice (Tr. 1294), petitioner took the stand and testified that his meetings at the ice cream store parking lot with Todisco and Vallone were for the purpose of delivering and receiving pornographic films (Tr. 1312-1313). The credibility of that testimony was severely impeached on cross-examination (see Tr. 1322-1332, 1335-1337, 1339, 1342-1343). Petitioner also testified on direct examination that he was in possession of marijuana cigarettes when he was arrested

In his summation to the jury, Stone reiterated the themes of his opening statement. He conceded that the government had established the existence of a large-scale heroin conspiracy, but argued that petitioner was not shown to have been a part of it. He suggested that the agents, in their overzealousness, had charged petitioner in order to sustain the continuing criminal enterprise charge against Todisco. In support of this argument, he emphasized omissions from the agents' reports, mistaken dates, times and places in their testimony, and inconsistencies between the testimony of different agents with respect to key aspects of the case. He also stressed that no search of petitioner's apartment was attempted, that petitioner's name was never mentioned by any of the other conspirators, and that petitioner was never seen at any of the places where heroin was seized. Counsel also pointed out that rather than possessing the wealth that a narcotics dealer would be expected to possess, petitioner's resources were modest enough that his wife was employed in a fulltime job. All of this, Stone argued, created at least a reasonable doubt concerning petitioner's guilt (Tr. 1403-1422).

2. Petitioner contends that his trial attorney rendered ineffective assistance and that the court of appeals erred in rejecting this claim on the basis of its longstanding "farce and mockery" test (see Pet. App. 9, citing *United States* v. *Bubar*, 567 F. 2d 192, 202 (2d Cir.), cert. denied, 434 U.S. 872 (1977)). Petitioner urges the Court to grant review in order to resolve a conflict between the Second Circuit and the other courts of appeals concerning the proper test for

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and believed that that was the reason for his arrest (Tr. 1309-1310). When asked on cross-examination whether he remembered the name of his marijuana supplier, petitioner replied, "Is he going to give me his name, address and phone number?" (Tr. 1344) — thereby undercutting counsel's attempt to establish that the undercover agent should have made inquiries of Acosta that would have revealed petitioner's identity had petitioner in fact been part of the conspiracy (Tr. 1119-1120).

evaluating ineffective assistance of counsel claims. This case, however, does not present an appropriate vehicle for resolving any such conflict, since petitioner's ineffective assistance argument properly would have been rejected under any standard. Trial counsel's actions of which petitioner complains (Pet. 4-5) were all part of a well developed strategy of emphasizing the strength of the government's case against the other defendants and attempting to show that, by contrast, the case against petitioner rested on speculation. This was not merely a reasonable strategy, it was the only one likely to offer any chance of success. That in the end it was not successful hardly establishes that the assistance of counsel was constitutionally ineffective.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1981

DOJ-1981-11